No. 248.

Brief of Dill & McDermott for Ap

Filed Oct. 9, 1899.

SUPREME COURT OF THE UNITED STATES

Office Supreme Court U. S.
FILED
OCT 9 1899
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1899

William Crawford
Appellant

against

William L. Hubbell, Treasurer of the Adams Express Company
Appellee

No. 248

BRIEF FOR APPELLANT

DILL, SEYMOUR & BALDWIN
Solicitors for Appellant

FREDERICK R. KELLOGG and JAMES B. DILL
ALLAN L. McDERMOTT
Of Counsel for Appellant

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Supreme Court of the United States.

WILLIAM CRAWFORD, Appellant, AGAINST WILLIAM M. HUBBELL, treasurer of the Adams Express Company, Appellee.	17,345. October Term, 1899. No. 248.

BRIEF FOR APPELLANT.

Statement of Facts.

This cause comes before this Court upon a certificate of the United States Circuit Court of Appeals in and for the Second Circuit, whereby the instruction of this Court is desired upon certain questions of law.

I.—NATURE OF THE ACTION. The action is brought by the appellant for an injunction restraining the Adams Express Company, represented in this proceeding by the above named appellee, its treasurer, from refusing to accept express packages from the appellant for transportation over its lines except upon the condition that the appellant either pay for or provide the War Revenue stamp required to be affixed to each receipt in addition to its usual and

ordinary charges for transportation, as the same existed on and for a long time prior to July 1, 1898.

It is a test case, the appellant representing the Merchants' Association of New York, composed of a large number of the leading express shippers of that city, and the appellee representing the interests of all the express companies having terminals in that city.

II.—NATURE OF THE DEFENSE. This is based upon two grounds:

FIRST.—That the War Revenue tax was not intended by Congress to be imposed exclusively upon the express company, even in the first instance, but that it is placed simply upon the transaction of shipment, to be paid indifferently by either party thereto; and

SECOND.—That even if the express company is compelled exclusively by the statute to pay the tax in the first instance, yet it is left free to relieve itself of this expense by refusing to accept express packages for transportation unless the shippers agree to assume the burden.

III.—THE ESSENTIAL FACTS INVOLVED are uncontradicted, and are briefly as follows:

1. That the Adams Express Company (hereinafter called the Company) for many years past has been engaged in business as a common carrier of express packages between the City of New York and other places located within the said State and other States of the Union, including Danbury, Connecticut (fols. 5, 15).

2. That among other contracts, the Company has entered into an arrangement with the New York, New Haven and Hartford Railroad Company whereby it acquired, prior to the dates involved herein, the

exclusive right to forward express packages over the lines of the said railroad between New York and Danbury, Connecticut, and that at said times the Company was the only concern engaged in that business between New York and Danbury (fols. 5, 16).

3. That prior to July 1, 1898, the usual and regular rate demanded by the Company for the forwarding of express packages of twenty pounds or under in weight, and of a value less than fifty dollars, between New York and Danbury, was thirty-five cents a package (fols. 6, 17).

4. That in August, 1898, the appellant was a large retail merchant in New York City and a large shipper of express packages out of the City of New York over the lines of the Company and those of other similar concerns (fols. 7, 17).

5. That on August 15, 1898, the appellant tendered the Company in New York a properly prepared parcel of the weight and kind above mentioned, to be forwarded from New York to Danbury, and at the same time duly tendered the usual and regular sum of thirty-five cents for such services (fols. 7, 8, 17).

6. That the Company refused to accept the said parcel unless the appellant should pay, in addition to the said sum of thirty-five cents, the price or value of the War Revenue stamp, or should furnish such stamp (fols. 8, 18).

7. That since July 1, 1898, the Company has refused and refuses to accept packages for transportation to any points upon its lines, except upon payment not only of the amount of its charges as they existed on and for a long time prior to July 1, 1898, but also of the cost of the War Revenue stamp (fols. 2, 18, 19).

8. That the Company, however, does not claim to have technically raised its rates of transportation, but takes the position that its *rates* (technically so called) remain as before, and that it is entitled to transfer the burden of the tax directly upon the shipper by quoting those rates, plus the tax, as two separate items (fols. 19, 20, 21).

9. That the appellant refused to pay the amount of the stamp demanded, as aforesaid, and was unable to compel the Company to receive the package, and that the same was not accepted or received by the Company.

10. That all, or nearly all, of the express companies having terminals in the City of New York have taken precisely the same position as that of the Adams Express Company (fols. 10, 21),

11. That the appellant has no adequate remedy at law in case the act complained of is held to be illegal (fols. 11, 22).

12. That the question is one of great importance, not only to the appellant and the company, but to every shipper of express matter and to every express company in the United States (fol. 12).

IV.—THE PROCEEDINGS BELOW. The cause first came on to be heard before Mr. Justice Lacombe of the Circuit Court, was dismissed by him upon the hearing and without taking briefs. In so doing the learned Justice took pains to state that he did so, not from mature conviction as to the appellant's lack of equity, but solely as a matter of first impression, and for the purpose of facilitating a hearing on the appeal at the earliest possible date.

An appeal was thereupon taken to the United States Circuit Court of Appeals in and for the Second Circuit. As a result of this appeal, the following questions were certified to this Court:

(1.) Does the War Revenue Act of June 13, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest, or other evidence of receipt required to be issued to each shipper of goods accepted by the carrier for transportation, or does it impose the tax merely upon the transaction of the shipment, leaving it to be paid indifferently by either party thereto?

(2.) If the War Revenue Act of June 13, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest or other evidence of receipt, from relieving itself of the expense of affixing and canceling the stamp required to be attached to such bill of lading, manifest or other evidence of receipt (fol. 2).

These points we will now consider.

POINT I.

The tax in question is imposed exclusively upon the business of transportation and is intended to be borne by the carrier in all cases where it accepts goods for transportation.

In the arguments below our opponents have attempted to treat this point as one of minor importance, claiming, to use their own words, that

> "Even had the act in express terms, imposed the tax upon the express company, the company might still properly and lawfully require its reimbursement by shippers as a condition of accepting goods for transportation. * * * The discussion as to the proper interpretation of the act becomes therefore purely academic."

Their position is, that whatever be the meaning of the law, the carrier may refuse to accept goods tendered unless the shipper agrees to pay the tax.

But the meaning of the statute appears to us to be the point of primary importance in this case.

For a common carrier, unlike a private individual, is not free to act or not, as he may choose. He is under an absolute duty to carry, and cannot evade or modify this duty by unlawful or unreasonable restrictions or conditions.

The question that it is therefore necessary to decide is whether the condition adopted by the carrier requiring the payment of the tax by the shipper, is or is not unlawful or unreasonable.

And this depends upon the intention of Congress as to who shall bear the tax when the common law duty to accept (which is not affected by the revenue law) has been performed by the carrier.

For if it was not the intention of Congress that the carrier should pay the tax, then clearly it is justified in refusing to carry goods unless the shipper does so.

But, if on the other hand, the legislative intent was that the tax should fall, not upon the citizen, but upon the carrier, then it is, as we shall attempt to show, unreasonable and unlawful for the carrier to refuse to comply with its common law duty to accept, save upon the condition that an unwilling shipper shall permit it to escape from the statutory burden.

What, therefore, is the intent?

The language of the act is as follows:

> "EXPRESS AND FREIGHT: It shall be the duty of *every* railroad or steamboat company, carrier, *Express Company*, or corporation or person whose occupation is to act as such, *to issue* to the shipper or consignor, or his agent, or person *from whom any goods are accepted* for transportation, *a bill of lading*, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and

transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included, *and there shall be duly attached* and cancelled, as in this act provided, *to each of said bills of lading*, manifests, or other memorandum, and to each duplicate thereof, *a stamp* of the value of one cent; PROVIDED, that one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. *Any failure to issue such bill of lading*, manifest, or other memorandum, as herein provided, shall *subject such railroad* or steamboat company, carrier, *Express Company*, or corporation, or person *to a penalty* of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

By Section 7 of the same statute it is provided that if any person shall make, sign or issue any paper, &c., without the same being duly stamped, such person is guilty of a misdemeanor and subject to a fine.

By Section 13 of the same act it is provided that any person who shall issue or cause to be issued any paper, &c., without the same being duly stamped, and with intent to evade the statute, shall be punished by fine or imprisonment.

THE CONTENTION OF THE APPELLANT is that it was the intent of Congress in these sections not merely to raise a certain amount of revenue from a stamp duty upon bills of lading, but that the revenue thus contributed should not come from the shippers of goods, but from the carriers themselves.

In other words, *the appellant contends that this particular tax was intended to be a tax upon transportation* which was to be borne by the companies or concerns engaged in the business of transportation, which was imposed upon this particular busi-

ness in view of its public or *quasi* public nature and privileges, and which was not intended to be placed as an additional burden upon the shoulders of private individuals.

THE APPELLEE'S CONTENTION, on the other hand, is that the provision of the statute above alluded to had no reference to the ultimate distribution of the burden of the tax; that the only intent of Congress was to raise a certain amount of revenue from whomsoever it might be; that the only reason for the rigorous penalties imposed by the act upon the carrier was to make it certain that the carriers would act (to quote from their brief below) as "tax collectors for the Government," and that their responsibility stopped at this point, leaving them free to compel the shipper to bear the burdon, if they saw fit.

Hence, the carriers claim that it is open to them to either compel the shipper to furnish the stamp to the company, who will then affix it, or to pay the price of the stamp furnished and affixed by the company.

In other words, they say that the tax was not intended to be one upon the business of transportation, but was simply a general tax to be computed in the particular manner indicated, the burden of which might fall upon any person who could be compelled to bear it by the operation of the commercial laws to supply and demand.

The first question then to be decided is as to whether this tax is a mere general and floating tax or whether it was intended to be laid upon the business of transportation.

Upon this point we submit the following considerations:

(*A.*) *In the levy of taxation, it is the duty and presumed intention of the Government to consider not merely the question of the raising of revenue,*

but the question of distribution of the burden of taxation.

The position taken by the appellee is, that the War Revenue Act must be interpreted solely in the light of the necessity on the part of the Government to obtain sufficient revenue for its maintenance, and that this having been secured, it is immaterial to the Government by whom the amount of the tax is paid.

This proposition, which lies almost at the foundation of the argument of our opponents, is, it is submitted, not well founded.

For, it is clearly recognized that in all civilized tax legislation, *not merely the needs of the Government, but the needs of the citizen are to be considered and presumably have been considered.*

> "In revenue taxes, other considerations are to be kept in view; the question being always not exclusively how a certain sum of money can be collected for public expenditure, *but how, when and upon what subjects it is wise and politic to levy the necessary taxes under the existing circumstances, having regard not merely to the replenishing of the public treasury, but to the general benefit and welfare of the political society,* and taking notice, therefore, of the manner in which the levy and collecting of the tax will affect the several interests in the State. * * *"
>
> Cooley on Taxation, p. 11.
>
> Story on the Constitution, Sec. 965.

> "The Congress of the United States may determine whether the tax upon the goods sold shall be borne or paid by the seller or buyer. *It is within the power of the Legislature to determine not only which party shall pay the amount of the tax to the Government, but upon whom the burden shall finally rest,* and also, for greater convenience in the collection of the tax, to provide that the amount of the tax shall be paid by one party to the Government and recovered back from the

other party, or deducted upon the final settlement with him. * * *"

Ammidown vs. *Freeland*, 101 Mass., 303.

"If the words of the law seem to be of relatively doubtful import, it may then, perhaps, become necessary to look beyond them in order to ascertain what was in the legislative mind at the time the law was enacted; what the circumstances were under which the action was taken; what evil, if any, was meant to be restrained; what was the leading object of the law, and what the supporting and secondary object. * * * We are therefore at liberty to suppose that the two main objects had in view in the framing of the provisions of any tax law were, first, the providing for the public revenue, and second, the securing of the individuals against extortion under governmental proceedings to collect the revenue."

Cooley on Taxation, pp. 264-5.

These authorities establish—

(1.) That in the interpretation of any particular tax legistation, we must keep in mind throughout the existence not merely of the one, but of the other, object of the Government, and must seek to ascertain the intent of the legislators as to both of these points.

(2.) That if the statute contains no express provisions upon these points, we must seek this intent by an examination of the inferences to be drawn from the act and from all the surrounding circumstances.

(3.) That the power of the Government is of so broad and sweeping a nature as to leave it free to prescribe where this burden shall rest.

What, therefore, was the intent of Congress in this regard?

In answering this inquiry we will examine

(*B.*) *The statute itself.*

(*C.*) *The similar statutes of* 1862, 1863 *and* 1864 *upon which the present act is modeled.*

(*B.*) *The intent to place the burden of this tax upon the transportatiom business appears affirmatively from the act.*

The following points are to be noted:

1. *A positive duty is imposed upon the carrier to issue a bill of lading* or a receipt *whenever goods are accepted* for transportation. "It shall be the duty of every * * * express company, etc. * * * to issue, etc. * * *."

2. "*There shall be duly attached and cancelled as in this act provided, to each of said bills of lading*" (to wit, bills of lading thus required to be issued)—the stamp specified.

3. *And it is clear that this stamp must be affixed before and not after the issuance.* For by paragraphs 7 and 13, if the bill were issued without a stamp the carrier would be subject to various penalties. The entire statute is so framed that when an instrument is required to be stamped, the stamp must be affixed before issue. And no presumptions to the contrary will be indulged in unless by virtue of express language to that effect.

The same construction was applied to the former stamp act.

In construing the Act of 1866, Commissioner of Internal Revenue Rollins says:

> "*It is the duty of the maker of an instrument to affix the stamp thereto, and to cancel the same in the manner required by law.*"
>
> 4 Int. Rev. Rec., p. 61.
>
> 4 Int. Rev. Rec., p. 164.

That the execution of the receipt includes as a necessary act to execution the affixing and cancellation of the stamp appears from the opinion of the Supreme Court of Illinois in *Latham* v. *Smith*, 45 Ill., 25, p. 26.

Speaking of the Stamp, the Court says:

> "If necessary, the note was as incomplete (without the stamp) as if it had lacked the maker's signature, and the attaching and cancelling it without authority would be as unauthorized as writing the maker's name to the instrument without authority. If that is important, it is the last act *essential to its validity, and is as much of the act of the maker as is the signature.*"

To the same effect is *Myers* v. *Smith*, 48 Barb. (N. Y.), 614, p. 636.

Since, then, the act requires the *Express Company* to issue the receipt, and that a stamp should be affixed thereto and canceled, the duty of affixing the stamp and of canceling it is as much essential to and a part of its issuance as the signature to it.

4. *In other words, the law requires the issue of a completed and valid bill of lading for all goods accepted.* It requires that the bill shall be complete before it is issued. It requires as one of the elements necessary to a completed bill that it should have the stamp annexed. It places this stamp on precisely the same footing as the paper, the ink, the signature, the clerical labor, and all of the other elements which necessarily go to make up a legal instrument of this nature.

5. *And from this it follows that the cost of furnishing this stamp is placed by the act upon the same party who necessarily bears the cost of all of the other elements above referred to, i. e., the carrier.*

The duty to issue is imposed upon the carrier and upon it alone, *in all cases where it accepts the goods for transportation.* We will discuss later its right to refuse to thus accept. But if, as a matter of fact, it has accepted, this absolute obligation is imposed upon it.

And the duty to issue includes the duty of preparing the document to be issued.

The duty to prepare this document includes the duty to provide and furnish all the materials and things necessary for its completion in its final form.

No other conclusions can be drawn from the law save by a forced and distorted construction.

6. *Further emphasis is placed upon this construction of these provisions by comparing them with the other clauses of Schedule A.*

The schedule in question specifies a large number of instruments upon which stamps are required, such as bills, charter parties, conveyances, &c., &c. *But in the great majority of these instances there is no duty imposed of any nature whatsoever.*

Thus it is left to the option of the parties to a commercial transaction as to whether bills of exchange, promissory notes, &c., shall be executed. There is no compulsion attempted to be placed upon any such individuals requiring them to cause such documents to come into existence.

In the present case, however, together with two other instances, we find this positive duty to prepare a document and issue a document, imposed.

And we find that Congress deemed not only that in this instance an absolute obligation to issue should exist, but also that this obligation should be imposed upon one particular party to the transaction and should not be left open and uncertain.

No duty whatsoever is imposed upon the shipper.

He is not required to demand a bill of lading. He is not required to cause one to be issued. He is not required to stamp any bill of lading which is issued,

He is not required to see that any bill of lading which may be issued has a stamp affixed. He is not prohibited from shipping goods unless such a stamped bill of lading is issued.

Why should this be so if Congress had intended to leave an open question as to the party by whom the burden of complying with this obligation in all its details was to be borne?

It is clear from the comparison of this provision with those where the duty was clearly intended to be settled by agreement of the parties that Congress appreciated *in this instance* the imposition of a *definite obligation upon a definite party* and not the mere creation of an obligation, the ultimate resting-place of which was uncertain.

7. *Again, if any doubt can remain as to the location of the burden it disappears when we look at the penalties which are imposed.*

They are solely directed against the carrier and not against the shipper.

They are penalties not merely for failure to issue an instrument such as would have been a bill of lading before the act, *but for failure to issue the bill as required by the act.* The Government requirements are not met by the issue of an *unstamped* instrument. The penalty is principally directed against the failure to properly affix the stamp.

They are penalties for failure to *issue* and not for failure to *demand or receive* the document specified.

The contrast is clear between the clause now under discussion and other cases where a duty is intended to be imposed upon both parties to the transaction, as in paragraphs 10 and 11, where any person who accepts or pays a domestic or foreign bill of exchange, draft, &c., without its being stamped, is made equally guilty with the person who makes, issues or signs such a document.

And it is no answer to this argument to say that the sole object of this provision was to compel the

issue of a document in each case and thus prevent the evasion of the tax.

Such was, undoubtedly, *one* of the objects of Congress.

But such an answer wholly fails to explain why Congress, in carrying out its intent, imposed its penalties for failure to comply with the law *solely upon one party* to the transaction.

And the only explanation of this is that the legislative purpose was twofold: *first*, to cause the document to be actually issued; and, *second*, to place the duty of issuing it, in its completed and legal form, upon the carrier and not upon the shipper.

8. *The provision with regard to Pullman and sleeping car companies* - as to whom a specific declaration appears that they shall pay for the stamp —has been claimed by the defendants to show that Congress intended to draw a distinction between these companies and others engaged in transportation.

But, aside from the consideration that the Pullman clause was entirely new, and was inserted after the first draft of the law, whereas the Express paragraph was modeled upon the wording of the old law, as we shall show, thus giving rise to a natural difference of phraseology, *exactly the contrary inference is, we submit, the proper one.*

For it must be remembered that the weight of authority is that a sleeping car company is not a common carrier or subject to responsibilities as such.

See cases collated in 22 Am. & Eng. Enc. Law, 797.

Hence, if no specific provision concerning them had been made, there might have been uncertainty as to whether they were subject to the duties expressly and impliedly imposed upon common carriers by the other clause of the act; and to remove all doubt and to prevent any claim on their part that the burdens imposed upon carriers generally should

not be borne by them as well, this special provision was enacted.

Its aim, when correctly interpreted, was not to distinguish but to conform to the section now under discussion.

9. The foregoing conclusions are in no wise affected by the fact that there is no positive duty contained in the language of the statute compelling a carrier to "accept" goods for transportation.

In using the word "accept" the statute clearly refers to the common law obligations of the carrier, among which is the well recognized duty to accept goods tendered for transportation if the same be of the nature which they ordinarily transport, upon tender also of their lawful charges.

The effect of the section is not to exonerate them from their common law duty to accept, *but to leave that standing as it did before, to assume that it will be performed, and to add to it a further and additional duty,* to wit, that when they do accept, *as they are required to do at common law under the circumstances mentioned,* they must issue a bill of lading with a stamp annexed.

In other words, they not only must accept if the conditions are proper, but upon such acceptance they must issue the bill of lading with the stamp upon it.

10. *Nor is Section 6 of the statute antagonistic to our position.*

This section provides that:

> "On and after the first day of July, 1898, there shall be levied, collected and paid for and in respect to the several * * * documents * * * described in Schedule A * * * *by any person or persons or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued,* the several taxes or sums of money set down, &c."

It is claimed by the defendant that this language should be considered as having the effect of leaving open as between the parties to any and all of the transactions enumerated in Schedule A, including that of shipment by express, the question of who should pay the taxes imposed thereby.

This is not the true construction of the section.

The documents involved in Schedule A are of two classes—first, those concerning whose execution no duty is imposed, and second, a very limited number concerning which an absolute duty imposed upon a definite party exists.

As to the *first* of these classes, the construction contended for by the defendants may appropriately apply without resulting in any contradiction of provisions.

But as to the *second* class, it cannot apply without giving rise to a positive, clashing, and irreconcilable inconsistency. In other words, as to *these* instances, positive obligations placed upon a particular individual by language which, as we have shown, was clearly so intended, will be absolutely nullified by such an interpretation.

Such a result can only be justified by unavoidable necessity, in the light of the well settled rules requiring all parts of the same act to be construed harmoniously, if possible.

But no such necessity exists; for a perfectly harmonious and consistent result is reached, if we take the meaning of Section 5, when interpreted in the light of the various and different matters to which it refers, to be simply *that it requires the stamp to be affixed by one party or the other, as the respective requirements of the various items of Schedule A may make it necessary; or by either one, in cases where no requirement exists.*

Such is the only true, natural, rational and consistent interpretation of the clause.

And that it is the correct interpretation appears even more clearly by a reference to the original War Revenue Law of 1862.

For the section in question is taken bodily, with practically no change, from Section 94 of the Act of 1862, Chap. 119, and from Section 151 of the subsequent amendatory act, Laws of 1864, Chap. 173.

In the old law, as in the present, this general clause referred by its terms to all of the instances mentioned in Schedule A.

But in the Schedule A of the old act there was no provision imposing such a duty upon any person.

The items of the tax therein imposed were all of a nature where no element of public policy was involved as to the party by whom the tax should be borne.

The Express tax was not contained in that schedule.

Hence the meaning of the section in question under the law as it then stood could give rise to no inconsistency or controversy.

And when this section was taken bodily from the old act and incorporated into the new, it is to be assumed that the framers of the statute intended it to be used in the same sense as that which it had formely possessed, and as applicable to matters of the same nature as those to which it related in the old law, and that there was no intention that its meaning was to be unnecessarily distorted by, or to effect a distortion of, a new provision in the new law different from any which the old statute had contained.

11. *The previous decisions.* It is, in the next place, of interest to point out that the interpretation of the act for which we contend has so far received the sanction of many officers and tribunals before whom the point has come, although the greater part of these rulings are not yet embodied in books of reports.

The first of these authorities is the opinion of Assistant Attorney-General Boyd, rendered on or about July 12, 1898, in which he says:

> "The purpose of the law is clear; *it was to tax the carrier* and not the shipper, and these provisions undoubtedly fix upon the express companies and other carriers the duty of providing, affixing and cancelling the stamp; and their failure to so provide, affix and cancel such stamp subjects them to the penalties provided by law."

The next authority upon the point is the decision of United States Commissioner Hunter, rendered at Ottumwa, Iowa, on or about July 16, and holding clearly that the express company must pay the tax imposed by the act.

The matter was next considered by the Commissioner of Internal Revenue on or about August 12th. He reached precisely the same conclusion, and held, as appears from the reports of the decision which we have been able to obtain, that the duty of issuing a stamped bill of lading rested upon the express companies.

The same subject also received elaborate consideration by the Railroad Commission of Georgia in proceedings instituted against the Southern Express Company, to prevent it from attempting to compel its shippers to pay the amount of this tax.

The matter was argued at length by learned counsel, and was carefully considered by the Commissioners; and the decision rendered by them is an absolute and unequivocal holding to the effect that the intent of the War Revenue Act was to impose a tax upon the business of transportation, and not to levy a tax either upon the shipper directly, or of such a nature that it might be transferred to the shipper at the will of the carrier.

We call attention to the following brief extracts:

> "*The person expressly charged with the duty to issue the bill of lading is also impressed with the implied duty of providing the agencies and instrumentalities necessarily*

> *incidental to the performance of the duty expressly enjoined.* Since he is bound to issue a bill of lading and cannot issue it without its being first stamped, *the duty of stamping is necessarily incidental* to, and consequently included in, the duty to issue.
>
> * * * * *
>
> If it had been the intention of the Federal Congress to require of the carrier no more than the delivery to the consignor of the unstamped bill of lading, then the penalty for failure to stamp and cancel the same would most naturally have been directed against the person who had in accepting the bill of lading subsequently failed to stamp it."

The same subject was again fully discussed before the Superior Court of Cook County, Illinois, the Hon. M. F. Tuley presiding, in proceedings which raised exactly the questions now before this Court.

Both these points were decided in favor of our contention.

We call the Court's attention to the following quotation:

> "It is contended that the section quoted does not expressly state that the Express Company shall attach and cancel the stamp. *It is, however, a necessary inference that it shall do so.* It is its duty to issue the bill of lading; it can only issue a legal bill of lading, and that is one duly stamped."

Referring to the supposed effect of Section 6, above alluded to, the Court, after discussing it, concludes:

> "But such general language used to designate all classes of persons who may under any provision of the act be required to pay the stamp tax will not be allowed to cast any doubt upon the express provision of the act requiring the express company to issue a receipt to the shipper."

The Court disposes of another contention made by the Express Company as follows:

> "It is contended that this construction put upon the words 'such bill of lading,' if applied to the same words in the next following provision prohibiting the reception by the Courts of 'such bills of lading' as evidence, unless duly stamped, would make the law mean that no stamped bill of lading should be received as evidence. Such a construction could not be made, as it is opposed to the very spirit and intent of the act. The Court is not disposed to be hypercritical as to the use of words by the legislative body, if it can discover the purpose and intent of the Legislature, and, if necessary, it will, in construing the act, reject as surplusage a word that is inadvertently used."

The decision was affirmed by the Appellate Court in and for the First District of Illinois in an opinion filed on March 14, 1859, which quotes and approves the entire opinion of Judge Tuley above referred to. In addition the following language is used:

> "The act of Congress does not affect the common law duty and right of carrier and shipper, as between themselves. It simply superadds to the unaltered common law duty of the carrier to receive and carry, the requirement that it shall issue a receipt or bill of lading for whatever package or parcel it does receive to carry, and that such receipt shall have affixed to it a revenue stamp of the value of one cent. *By every rule of construction and inference, the duty to furnish and pay for the stamp required to be put upon the receipt, which must, under the law, be issued, devolves upon the carrier who is required to issue it.* The carrier must issue the receipt; it cannot issue it unless stamped, without subjecting itself to a penalty many times in excess of the value of the stamp. *It is for the carrier's benefit that the stamp must be affixed and canceled, for without the stamp it cannot do business.* The shipper's rights under the law are not dependent upon the issuance of a re-

> ceipt to him. As to him it imposes no burdens and gives no rights, and is not even necessary as evidence—it is a mere convenience as to him.
>
> "And, besides, it is manifest from the whole act and the purpose it was enacted to aid in accomplishing, that the legislative intent in enacting it was to place a tax upon the business of the carrier, and this the carrier should not be permitted to avoid by forcing its shares of lawful burden upon an unwilling shipper."

The question next arose in Texas, where complaint was made to the Attorney-General to the effect that the express companies were attempting to raise their rates above the amount fixed by statute, for the purpose of reimbursing themselves for the amount of this tax.

The question was considered by the Attorney-General, who thereafter rendered an opinion entirely in accord with our contention, to the effect, to quote from his letter to the Merchants' Association of New York, that

> "The language of the Federal statute plainly pointed out that the express companies must pay the tax; that the shipper is in no sense responsible therefor, for the reason that the express companies are compelled to issue the bill of lading, manifests, &c., and are prohibited from issuing them until the stamp has been affixed."

The question next arose in Michigan, in the case of *Attorney-General* vs. *American Express Co.*, in the Circuit Court of Wayne County.

The decision of the Circuit Court was absolutely in favor of our contention on all points involved.

From this decision an appeal was taken to the Supreme Court of Michigan, and resulted in a judgment of affirmance.

The Court said:

> "The main question in the case relates to the construction to be placed upon the act in question.

"By the act every express company is compelled to issue to every shipper or consignor, &c., a bill of lading for each shipment received for carriage, to which bill of lading and duplicate thereof shall be attached and canceled a stamp of the value of one cent. The law therefore imposes upon the carrier the obligation to issue the receipt. With this the shipper has nothing to do. He delivers the package to the company, pays or tenders the usual charges. This ends the shipper's duty; and the law then compels the carrier to issue the receipt or bill of lading. This bill must be stamped and the stamp canceled. It is evident that it is as much the duty of the company to place the stamp upon the receipt and cancel it as it is to issue the receipt. This duty is made more apparent by the fact that the act further provides that failure to issue the receipt makes the carrier so failing amenable to a heavy penalty.

But it is contended by counsel in a brief filed with this Court that the penalty was directed and intended by Congress to be directed to the failure to issue the receipt and nothing more, leaving the question of the stamping of the same to be settled by the parties.

It seems to us that what is meant by this clause is that the receipt must be such as is provided, that is, a receipt bearing the proper stamp, and that the penalty is provided for such a failure as this. It is and always has been the custom of express companies to issue receipts for goods delivered for shipment. The only interest the government has or can have is the affixing and cancellation of the stamp to aid it in its war revenues. We are therefore led to the conclusion that the duty to issue the receipt and the penalty affixed for the failure to do so implies that it is to be a receipt which would bring the government the revenue provided, therefore the act makes it the duty of the company to affix the stamp."

It is contended by our opponent that a contrary determination has been reached by Judge Purnell,

in the Western District of North Carolina. As the learned Justice appears not to have written an opinion, it is, of course, impossible for us to analyze his reasoning.

The appellee also relies upon a letter written by the Attorney-General to one of the counsel for the Wells-Fargo Express Company. On examination of this letter, however, it will be found that the Attorney-General does not express any opinion as to the merits of the contention as between the shipper and the Express Company. He merely states that the matter is not within my province of consideration." This is perfectly true; but does not affect our present claim, or even purport to be an expression of opinion concerning it.

We may, therefore, we think, correctly claim that the clear weight of all existing authority is in favor of our contention.

12. *In the next place, if the question be asked as to why Congress did not use in the express clause positive language,* such as that in the one relating to Pullman companies, we need only observe at the moment, that, as we shall shortly demonstrate, the express clause was modeled upon an old statute, the meaning of which had long been settled to be as claimed by us; while the Pullman clause was an afterthought first suggested and inserted after the act was nearly completed, and framed without reference to any existing model or authority. The difference in the language used furnishes, under the circumstances, no argument as to any difference of meaning.

(13.) *The Senate debates upon this portion of the act.*

It is of course clear that this Court pays but slight, if any, attention to the remarks made in general debate in the Houses of Congress as indicative of the meaning of pending legislation.

Our adversaries have, however, dwelt with some stress during the arguments below upon certain passages in the *Congressional Record* relating to this statute.

One of these relates to the Pullman Company clause, which we have already discussed.

Another is based upon the provision that only one bill of lading shall be required for bundles of newspapers inclosed in one general bundle, it being claimed that the addition of this clause at the request of a committee of newspaper men was equivalent to an admission that otherwise the tax would have to be borne by the papers.

With regard to this argument it is only necessary to observe that the interpolation removes a possible liability, not merely from the papers, *but from the carriers as well.* It lessens *but does not shift* the revenue from newspaper packages, *but does not at all specify upon whom the burden would otherwise have fallen.* Undoubtedly the journals knew that the express companies would try to compel them to pay a tax on each particular bundle, and undoubtedly they did not wish to accept the chance and expense of a long litigation, but desired such a change in the law as would remove any uncertainty. And undoubtely the Senate was not unwilling to yield to a reasonable request of this nature, especially when made by representatives of such an organization. But other than this, we are unaware of any argument of importance than can be drawn from the debates upon this point.

Since this general inquiry concerning these debates has arisen, however, we wish to ourselves invite the attention of the Court to three points in this connection. They are the following:

(*a.*) On May 19th this particular clause was under discussion, and the attention of the Senators was directed to the effect of the penalties imposed by the act. The question was asked as to the meaning of

the two penalties found in different parts of the statute, in reply the following statement was made:

> "Mr. Gorman: I wish to call the attention of the Senators in charge of the bill to the fact that the penalty in this case for the refusal to use a stamp is only a fine, which I think is right, whereas in every other case the person is subjected to imprisonment where the stamp is not used.
>
> "Mr. Chilton: It is not a failure to use the stamp, it is failure to issue a bill of lading. This penalty is a different thing.
>
> "Mr. Jones (of Arkansas): That is correct.
>
> "Mr. Gorman: In order to escape taxation *the bill of lading will not be issued*, so the principle is the same.
>
> "Mr. Chilton: *The other clause would apply to the corporation for failure to use the stamp.* This is a double penalty, or it amounts to a double penalty. It is intended to force the corporation to issue a written paper."

(*b.*) During the course of the discussion as to the revenue bill, a gross receipt tax upon corporations was proposed and discussed at great length.

Among other statements made in this connection which bear upon the present tax are the following:

On page 6028 Mr. Nelson alludes to the substitution of the gross receipt tax for the stamp act and says:

> "If you include telegraph companies and make them pay a gross earning tax, *you ought to relieve them from the stamp tax, as you propose to do in the case of railroads.*"

This indicates the intent of the party proposing the amendment to do as was done under the old act, substituting a gross receipt tax in lieu of the stamp tax.

(*c.*) In connection with the same proposed amendment as to gross receipts, we call particular attention to the colloquy which took place between Mr.

Pettigrew and Mr. Gallinger with regard to Mr. Pettigrew's proposed imposition of a gross receipt tax upon express companies and other carriers. The colloquy is as follows:

> "Mr. Gallinger: I rise to inquire of the Senator if it is proposed to put this tax upon these corporations *in addition to the stamp tax?*
> "Mr. Pettigrew: Certainly.
> "Mr. Gallinger: *It is an additional tax?*
> "Mr. Pettigrew: Certainly.
> "Mr. Gallinger: Then it certainly ought not to be adopted";

and the amendment was thereupon voted down.

It is submitted that this colloquy, going, as it did, directly to the essence of the stamp tax and the gross receipt amendment, shows unmistakably what the Senate understood to be the effect of the stamp tax.

The foregoing statements clearly show, it seems to us, the intentions of at least a portion of the Senate in passing this law.

14. *In the last place, it must be noted that practically all the railway companies, as we are informed, have acquiesced in our contention,* and have themselves assumed the burden of the tax.

The express companies, we believe, are the only carriers who are attempting to contest the point.

But the duties imposed are all created by the same paragraph of the law, and bind all carriers in the same manner; and hence the construction adopted practically by the railways is of importance as bearing upon the duties of the express companies as well.

In the light, therefore, of all the foregoing arguments and of the authorities bearing upon the point, *it is submitted that the intention of the act itself appears to be, not merely to levy a general or floating tax, nor to levy a tax upon the shipper and*

citizen, but in the exercise of the legislative power as to equitable distribution of the burden of revenue among the various objects of taxation, to impose in this instance a specific burden upon the business of transportation in all cases where goods are accepted by the carrier for that purpose.

(*C.*) *The history of the former War Revenue Laws clearly shows that the tax in question is one upon transportation.*

The imposition of a tax of this nature is by no means a new departure, for a similar clause was contained in the original War Revenue Act passed during the days of the Rebellion.

The original statute was contained in the Laws of 1862, Chap. 119, Sec. 105, and was as follows:

> "That on and after the date on which this act shall take effect, *no express company* or its agent or employee *shall receive* for transportation from any person any bale, bundle, box, article or package of any description, *without delivering to the consignor thereof a printed receipt having stamped or affixed thereon a stamp denoting the duty imposed* by this act, *or without affixing thereto* an adhesive stamp or stamps denoting such duty, and in default shall incur a penalty of ten dollars: Provided that but one stamped receipt or stamp shall be required for each shipment from one party to another at the same time whether such shipment shall consist of one or more packages; and provided also, that no stamped receipts or stamps shall be required for any bale, bundle, box, article or package transported for the Government, nor for such bales, bundles, boxes or packages as are transported by such company without charges thereon."

In the schedule (Schedule B) specifying the amount of the tax thus imposed the following items occur:

> "Express: For every receipt or stamp issued by any express company or carrier or

person whose occupation it is to act as such, for all bales, boxes, packages, articles or bundles for the transportation of which such company, carrier or persons shall receive a compensation of not over twenty-five cents ..... 1 cent

When such compensation exceeds the sum of twenty-five cents and not over one dollar ..... 2 cents

When one or more packages are sent to the same address at the same time and the compensation therefor exceeds one dollar .. 5 cents

This tax continued in force until the passage of the Laws of 1863, Chapter 74.

At this time it was repealed in the following language (see Sec. 6):

> "The duty or stamp required *for transportation* by express companies and others, is hereby repealed and *such transportation* shall be exempt from stamp duty."

By the same act, however, a tax was imposed upon the gross receipts of such concerns, the language of the statute being as follows (see Sec. 10):

> "On and after the first day of April, 1863, any person or persons, firms, *companies or corporations, carrying on or doing an express business, shall in lieu of the tax and stamp duty imposed by existing laws,* be subject to pay a duty of two per cent. on the gross amount of all of the receipts of such express business; and shall be subject to the same provisions, rules and penalties as are prescribed in Section 80 of the act of which this is an amendment for the persons, &c., having the management of railroads, &c."

By comparing the original statute with the present act it is at once seen that the latter is modeled upon the former, the principal differences in phraseology being due to the inclusion in the same section of the new act of all classes of carriers, which was not the case in the former law.

It is especially noticeable that in neither case is there a specific provision as to the party who shall pay for the stamp.

Hence any analogies to be derived from the original statute are of importance in determining the true meaning of the new enactment.

On an examination of the original act the followings points appear:

1. *The original tax was a graded tax, and varied in amounts depending upon the amount of compensation received by the company.*

This is shown by an examination of Schedule B of the original statute.

This point seems to us of significance.

The amount of the tax was evidently not intended to be a greater burden upon the shipper, as the charge which he was compelled to pay increased, but was intended to be a greater burden upon the company, as its compensation for rendering the service became larger.

2. *Moreover the original act contained distinct provisions exempting the company from responsibility from this tax in cases where it carried articles without charge.*

Why should such an exemption have been inserted in the act were it not that it seemed unfair to impose a tax upon the company in instances where no compensation at all was received by it?

The fairness of this exemption becomes obvious when the matter is considered as a tax upon the company and not the shipper.

And on the other hand, it seems meaningless if the tax were intended to be placed upon the shipper and not the company, for there certainly could be no reason as between the shipper and the Government, if the former were intended to bear the burden, *why he should not do so the more readily in cases where no charge at all was imposed upon him*

by the carrier for the services rendered in transportation.

3. *The intent to place this tax upon transportation and not upon the shipper is further clearly indicated by the language of the repealing act.*

The statute says that the duty required *for transportation* by express companies and others is hereby repealed, and *such transportation shall be exempt from stamp duty.*

What more clean cut statement could be desired of the fact that the duty as origanally levied *was a duty upon transportation* and not upon the party for whom the transportation is performed.

4. *The same point is further brought out by the language of the same statute imposing for the first time a gross receipt tax upon carriers.*

For the language of the statute is that after the date specified *all express companies, etc., in lieu of the stamp and tax duties imposed by existing laws* shall be subject to the gross receipt tax specified.

Again we ask, what more precise statement of the nature of the pre existing impost could be asked for than that contained in this language?

This clause as well as the one last above mentioned, are positive declarations by Congress that its intent in imposing the original tax, was to place it upon the transportation business and upon the concerns engaged therein.

5. *In this connection it will be kept in mind that the gross receipt tax which was expressly stated as being imposed in lieu of the stamp duty, is beyond question a tax upon transportation,* the transportation business, and the concerns engaged therein, and is not a tax upon the shipper.

And, as we shall subsequently show, such a tax is not in the case of *quasi* public concerns, permitted to be shifted upon the citizen for the reimbursement of the carrier.

Suffice it, however, to say at the moment, that since this gross receipt tax was expressly stated to be in lieu of the stamp tax, and since the substitute was unquestionably a tax upon the transportation business, it follows that the tax whose place the substitute occupied must likewise have been of a similar nature.

6. *The position which we have taken as to the effect and extent of the former War Revenue Act is directly supported not only by judicial authority but by the interpretation placed upon it by the Express Companies themselves*, and by Mr. Clarence Seward, their own counsel.

The entire subject came up for discussion in the case of *De Barre* vs. *Livingston*, 48 Barb., 511.

In Mr. Seward's brief he reviews the history of the War Tax upon Express Companies. He first alludes to the original stamp tax and then says:

> "The practical working of this provision was so onerous and cumbersome *that the companies applied to Congress to change the method of taxation from the stamp tax upon the receipt or package to a tax upon their gross receipts.* This request was complied with. * * * The stamp was replaced by a duty on gross cash receipts" (p. 514).

Mr. Seward then refers to the Act of June 30, 1864, imposing a tax upon receipts for the delivery of property and says:

> "So the companies *found themselves doubly taxed;* once on their gross receipts, and once for the stamp duty" (p. 514).

Mr. Seward further says that the express companies applied to the Commissioner for relief from this double tax, but that the application was denied. He then says:

> "The Express Companies complied with this decision and used a two cent stamp until

> the next session of Congress, when they applied to be relieved therefrom. Such relief was granted" (p. 516).

In again alluding to the effect of the repeal of the original stamp duty, Mr. Seward states:

> "That Congress changed the method of taxation advisedly and placed the tax upon the gross incomes of the Express Companies *and relieved them from all stamp duties*" (p. 517).

From the language of this brief, as well as the history which it so clearly sets forth, no room is left for doubt as to the nature of the original stamp act as imposing obligations upon the company.

And the same view was entertained by the Court, for its decision clearly shows that it treated the original stamp act as a tax upon the carrier itself. Thus, in alluding to the repeal of the original stamp provision, the Court says:

> "The Act of 1863 repealed all duties by way of *stamps against express companies and substituted in its place a duty of two per cent. on the gross amount of all receipts of the express business.* * * * I think the intent of Congress may be inferred from the previous legislation on this subject. *Originally the companies were compelled to give a receipt with a stamp of one to three cents,* and the provision as to agreements excepted all others contained in the same schedule. And then the Act of 1863 relieved *these companies from all obligation* to pay these duties, and expressly declared them exempt from stamp duty."

What more explicit declarations could be desired to the effect that the original stamp duty was a tax upon the express companies.

For the foregoing reasons it is submitted that the intent of the present War Revenue Act was to

leave without change the carrier's common-law duty to accept goods duly tendered for transportation; that it assumed the continued future performance of this duty as in the past, and imposed upon the carrier, when the duty has been complied with and the goods accepted, the burden of the tax.

We will now consider the right of the carrier to refuse to do this duty, except upon condition that the shipper himself pay the tax.

POINT II.

The imposition of this tax upon the carrier precludes it from relieving itself of the expense by refusing to accept goods for transportation, unless the unwilling shipper himself assumes the burden.

The exact position of the appellee will clearly appear from quotations from his brief in the Court below:

> "The distinguishing characteristic of an indirect tax is the fact *that it may be shifted* from the individual upon whom it is originally imposed, and again shifted until it rests finally where it is most easily borne, as in the familiar instance of duties upon imported goods, where the tax is first paid in bulk by the importer, then by him distributed among his wholesale customers, who in turn exact it from the consumer. * * * The law imposes the tax upon neither party to the transaction, but upon the transaction itself, *leaving it to the agreement of the parties, or the customs and usages of trade* to determine by whom it shall first be paid and on whom it shall ultimately rest.

> * * * Such is the history of excise taxes and duties ever since they have been invented. The importer collects the duty which he has to pay the Government by collecting a higher price for his goods; the distiller collects the revenue stamp by imposing an additional charge upon his consumers; the tobacco manufacturer recoups himself for the Governmental charge put upon his business by making his customers pay a higher price for the manufactured article; and here the carrier would undoubtedly be compelled to increase its rates if it had to bear the tax itself. All such taxes are always borne at last by the consumer as an incident in the cost of the article which he consumes."

Following this line of argument the appellee claims that any carrier who is thus taxed may require the shipper, as a condition of his goods being accepted for transportation, to consent to such an agreement of indemnity.

These claims we combat for the following reasons:

(*A.*)—*The appellee's contention would permit the shifting of the burden, not by agreement, but by illegal duress.*

1. We may admit for the sake of the argument that a party taxed may indemnify himself against such taxation *by contract* with another who is willing to *voluntarily* assume the burden.

2. But we insist that this can only be done *by contract—i. e.*, by the free and willing *assent of both parties*, acting without duress or compulsion. Unless such untrammelled and voluntary meeting of the minds exist there can be no contract.

3. And in the present case it is clear that there is no such assent. The shipper has not only not agree to assume the burden, but is insisting that the carrier shall bear it.

The question here presented is whether the carrier can relieve itself of the tax by its own arbitrary act, wholly independent of the assent of the shipper thereto, and not whether the liability can be shifted by the *joint act* of both carrier and shipper.

4. Since, therefore, there is no such contract of indemnity, the next question is as to whether the carrier may refuse to transport unless the shipper agreed to so indemnify him, thus compelling the shipper to make such a contract.

In support of the claim that the carrier may do this the defendant has cited many instances arising in ordinary commercial transactions, such as the resale of imported merchandise with the duties added to the price, &c.

But such instances are wholly inapplicable to the present case.

In such transactions the parties are perfectly free to contract or not, as they see fit. There is no existing duty upon the one to sell or upon the other to buy. Neither the Government nor the other party can compel the making of such a transaction. And if the parties do see fit to make an agreement it may contain any lawful terms which they are willing to incorporate in it.

In the case of a carrier, however, such a situation does not exist.

The carrier is not free to transport or not as he may see fit. He is bound by law to accept goods for transportation upon tender of his usual charges.

And he cannot evade the duty by attaching to it any conditions which are unlawful or unreasonable.

300 *Tons of Coal*, 14 Blatchf., 453.

Chicago, &c., R. R., v. *Suffern*, 139 Ill., 274.

Garton v. *R. R.*, 1 B. & S., 112.

Southern Express Co. v. *Moore*, 29 *Miss.*, 822.

And if we are correct in our claim that this tax was intended to be borne by him and not by the citizen, it follows that to permit him to refuse to carry unless indemnified, would be to allow him to compel the shipper *to consent to the violation of the tax law by the carrier as a condition of his performing a duty he is already bound to perform, i. e., to allow the carrier to insist upon illegal and therefore unreasonable conditions being attached to his common law duty,* a privilege which finds no warrant in the statute or in the decisions.

In a case like the present, especially where the carrier exercises a monopoly of express transportation between the terminal points, the shipper would be, it is submitted, subjected to duress and compulsion of the most illegal nature if any such condition were allowed to be imposed.

Whatever may be the right of the individual to *contract* for such indemnity in ordinary cases, it surely can have no application to a case where no true contract exists, and where the tax burden is sought to be thus shifted *by compulsion* and against the will of the citizen.

The only construction of the statute and of the carrier's common law obligation which can prevent such an injustice is the one for which we contend, prohibiting such an attempt.

(*B.*) *The results of adopting the defendant's contention.*

As bearing upon the propriety of such a construction, let us look at the results which will otherwise follow.

The business here involved is a *quasi* public business conducted by corporations and other organizations which are *quasi* corporate in their character, operating under privileges and franchises from the sovereign, including in all cases the right to take tolls; and as a consideration for the exercise of these

privileges and franchises the obligation of such concerns to pay a tax to the Government, if desired, entirely independent of all other considerations and independent of any tax which may be levied upon their property has always been fully recognized.

And if it be lawful for those taxed to relieve themselves from taxation by their own arbitrary acts, then follows that the *intent of the Government to exact from the carrier a consideration for these privileges will be entirely nullified;* that the carrier's profit remains the same; that the exercise of these privileges continues without any corresponding burden imposed; *and that the tax upon transportation, instead of being a tax upon transportation, is an additional burden upon the private citizen.*

If such had been the intent of the Congress, why should such a tax have been characterized as one upon transportation and not as one resting upon the individual?

The carrying business of the country is in the hands of gigantic corporations and associations, enjoying public franchises of the greatest value, earning annual profits of immense amounts, and employing hundreds of millions of dollars of capital.

The only provisions of the War Revenue Act directly affecting these organizations is the one now under consideration, which covers them all alike.

Hence it will be seen that if our opponent's contention is correct, *not only the express companies but all of the carriers to which the section in question relates will entirely escape the tax thus imposed.*

Is it reasonable to suppose that this was the intention of the law-making power, and that these concerns were only meant to be appointed *agents* to collect the revenue from the citizen upon whose shoulders they should be free to shift the load?

Or is it reasonable to believe that all carriers, in consideration of the public privileges which they

enjoy, were intended to themselves bear a part of the burdens arising from the Nation's emergency, of the immense wealth which they have accumulated under the Nation's protection—a wealth which in the case of the present defendant enabled it in the year 1897 to make a present to each of its stockholders of an amount in collateral trust bonds issued by the company, and secured by gilt-edge securities, equal to the amount of stock held by the stockholders, to wit, *twelve million dollars out of the profits and surplus fund which it had been able to accumulate during its business career, and without exhausting to the full such entire surplus and profits.*

We quote the pertinent words of Commissioner Atkinson of Georgia upon this point:

> " Aside from these considerations, when we take the broader view and consider the circumstances under which and purposess for which this bill was passed, when we consider that the country was just engaging in a conflict with a great and powerful nation; that in consequence it was necessary to raise by taxation enormous sums of money to maintain the national military and naval forces and equipment, and that, in order to raise this money it was necessary to bring under the taxing power all the resources of all the people; that every industry and every person, even in the most trivial domestic and business concerns, are required by the system of stamp taxation devised to contribute to this common fund; that it is so far reaching in its effect that none could escape the exactions of the tax gatherer. It is not conceivable that the Federal Congress should have selected great transportation companies of the country as the sole object of special legislative benefaction, and taxing all others, exempt them alone from the operation of the law. If it be ultimately held that the carrier is not liable for this tax, he is excused from all contribution to the general fund, for while other corporations are taxed upon special transactions and upon gross and net receipts, these

> corporations are exempted from that class of taxes, and throughout the whole scheme of this elaborate piece of legislation there is no provision which by any possibility can be so extended as to impose upon the carrying companies of the country any portion of the common burden. It is submitted that to attribute to the Congress such a purpose would be to deny to it credit for either patriotism or a proper sense of justice."

(*C.*) *The intent of Congress as shown by various enactments.*

1. That it is not the intent of Congress in this case, and never has been its intent in other similar cases that the results just alluded to should be within the power of the carrier to accomplish at will, seems clear from an examination of the former War Revenue law relating to railroads.

The language of the Law 1864, Chapter 173, Section 103, upon the point, is as follows:

> "That all persons * * * or corporations owning or possessing * * * any railroad * * * shall be subject to and pay a duty of two and one-half percentum upon the gross receipts of such railroads * * * *provided that all such persons, companies and corporations shall have the right to add the duty or tax imposed hereby, to their rate of fare whenever their liability thereto be commenced, any limitations which may exist by law or agreement with any person or company which may have paid or be liable to pay such fare to the contrary notwithstanding.*"

The Court will observe that this particular law contains an express grant of a privilege to shift the burden imposed.

But why was this special proviso and privilege inserted in this section?

Manifestly because it was recognized by Congress that if such rights were not granted, the railways

would have no power to reimburse themselves for the tax levied.

Manifestly because it was understood by Congress that the imposition of such a tax, without any further provision, would be equivalent to a prohibition against the shifting of the burden from the carrier to the citizen.

In other words, in the section just quoted it was the intention of Congress to make the carrier really the collecting agent of the Government, and to impose the tax not upon the carrier but upon the traveling public. And it was seen by Congress that unless an express clause to that effect was inserted in the act its intent would be defeated, and the tax would be a tax upon the transportation business, to be borne by it alone without recoupment, and not a tax upon the individual.

It may be urged in opposition to this view that Congress only intended to cover cases where fixed contracts for definite rates had theretofore been made by the carriers, or where special *statutory* limitation upon charges existed.

Such, however, is a forced construction.

The language refers to any limitations "*by law*," not "*by statute*," and evidently is intended to cover cases not only where special enactments exist, but also cases where the carrier is subject only to the operation of the ordinary common law rules by which it is limited in its charges to reasonable rates.

There is no less a limitation in the one case than in the other, for in both the carrier may demand only a reasonable compensation. But of this not even the Legislature can deprive him.

It is submitted that this statute constitutes a legislative declaration in the clearest terms that in cases of this description, where a tax is imposed upon a *carrier*, there always exists a prohibition against the transfer of the burden at the will of

the carrier alone, unless such power be expressly granted.

2. And upon a further examination of the old war revenue laws, it will be found that neither in the original Express Tax Act, nor in the statute substituting a gross receipt tax upon express companies in place of the former stamp act, was there *any provision whatever to the effect that the express companies should be authorized to recoup these taxes by raising rates, or by directly or indirectly compelling the burden to be borne by their customers.*

Hence it seems to be a necessary inference that a different intent was cherished by Congress with regard to this particular tax, and that the burden of the legislation concerning express companies was desired to fall not upon the citizens, but upon the concerns by whom the tax was primarily payable.

And, as we have already shown, this burden was then accepted and acquiesed in by the express companies until the law is amended.

The similar absence of any such privilege in the present express company tax act shows that under the new law, as under the old, the company is intended to bear the tax.

3. This interpretation appears to be emphasized by another result of the present act.

For it is clear, that none of the carriers taxed can raise rates to recoup themselves for the tax in cases where such rates are fixed by statute. The provision of the old statute as to railroads is entirely omitted in the new law.

Hence, it was certainly the intention of Congress that *in such cases, at least*, the burden of the tax should be borne by the carrier and should not be placed upon the shipper.

And from this it follows, if the contention of our adversaries be correct, that a difference exists between the rights of the carrier on the one hand, where statutory limitations of rates exist, and on

the other hand, where there are no such limitations. For in the *latter* case they say the carrier is free to shift the burden, while in the *former* he is bound to bear it.

But why should it be supposed that the intent of Congress was that the carrier whose rates are not limited should have greater privilege than the carrier who is already restricted.

The situation in the former case is already much more favorable to the carrier than in the latter.

If it is no injustice where the carrier's charges are regulated by statute to compel them to bear the burden of this tax, why should it be injustice where no such regulation exists, and where they have been free to fix the highest reasonable charges for their services?

Rate legislation is *invariably repressive.*

If there be any situation in which the carrier needs protection *it is where such legislation exists* and not where it does not exist.

And if Congress does not see fit to extend such aid when it is most needed, why should it be supposed to be willing to extend it in situations where it is least required?

In other words, where a carrier's rates are already limited by statute Congress certainly intended to impose upon it the additional burden of the tax.

There is no reason why it should be supposed not to have intended the same result where no statute exists.

This conclusion is made more clear by keeping in mind the real nature of rate legislation.

It does not change or do away with the general common law rule that a carrier may charge reasonable rates, the amount of which may always be inquired into by the Court.

It is simply a declaration by the legislative power of what in its opinion is a reasonable rate. This declaration is not even conclusive, for if, as a matter

of fact, such figure be unreasonable, the courts will so declare it.

In either event, whether such legislation does or does not exist, the same general principle as to reasonableness governs the question of rates. And this being so, there appears to be no such difference between the situation of the carrier in the one case and in the other which should make it reasonable to suppose that the carrier was intended to have the right to increase rates in the latter class of cases to meet the tax, while not possessing this right in the former class of cases.

Hence, as it has been in effect declared by Congress that such a right can only exist in the former class, at least, by an express grant, and as no such grant exists in the present act, the inference appears very strong that no such right was intended to exist in either class.

4. Further light is thrown upon this question by the examination of other provisions in the former revenue acts.

In the Acts of 1862, 1863 and 1864, were several provisions imposing taxes upon interest payments, coupons and dividends, made, issued, or declared, as the case might be, by various corporations.

See Laws of 1864, Chap. 173, Sec. 122.

It was clearly recognized at the time that questions might arise as to whether this duty was one levied upon the various corporations mentioned, or upon the individuals to whom the interest or dividend payments might be named. And with the intent of placing this matter at rest, Congress especially provided in the acts alluded to that it should be lawful for the corporation to deduct the amount of such tax from the amount of any interest or dividend payment which otherwise might be made.

With such provision as this there would at first seem to be no doubt that the tax was intended to

be one upon the stockholders or creditors and not upon the company.

And yet it is most interesting to notice that even under such provisions this Court has, on several occasions, said that this tax was one *upon the company* and not upon the stockholders or creditors.

Barnes v. *The Railroads*, 17 Wallace, 294.

Bailey v. *The Railroads*, 22 Wallace, 63.

Railroad v. *Slack*, 100 U. S., 5957.

The Court has on several other occasions given expression to the contrary view.

United States v. *The Railroad*, 17 Wallace, 322.

Stockdale v. *Insurance Co.*, 20 Wallace, 329.

See 106 U. S., at page 327, &c.

But the point to which we wish to call attention is that if even under such an express provision it could be even intimated by the United States Supreme Court that the tax was upon the company and not upon the individual, *what would have been their ruling had no such power to deduct been incorporated into the Act?*

Is it not most probable that the uniform opinion of the Court would have been that the tax was a corporate and not an individual obligation?

And would a power to deduct the amount of the tax from the dividend or interest payment, i. e., a power of recoupment similar to that now claimed to exist, have been implied under such circumstances?

We think not.

(D.) *The prohibition against the carrier's relieving itself of this expense applies to all attempted increase of its charges for that purpose, whether in the form of a direct transfer of the tax, as such, upon the shipper, or of an indirect recoupment under the guise of a raise of its rates.*

The points arising in this connection are two-fold:

I.—*The present case does not involve an attempt upon the part of the carrier to make a reasonable increase of rates within the legal signification of the term.*

The carrier has not accepted the tax as a tax upon the transportation business, and attempted to earn an additional sum equal to the burden thus imposed *by an equitable and proportionate revision* of *all its rates* for transportation.

It has simply attempted to transfer the tax *as a tax* upon the shipper by adding the *exact amount* of it to the rates heretofore established.

The tax is not made a part of the rate, but is an additional and distinct item (see Answer, fols. 19, 20), *which the shipper may defray by producing the stamp itself instead of an additional sum equal to its price.*

The facts show a direct attempt to compulsorily shift the tax bodily upon the shipper and not to revise rates so as to meet an increased cost of operation.

Whatever the reasons for this course may have been, the fact is clear that the shipper is required to pay the tax *as a tax*, and that no revised schedules of rates has been adopted.

The point was commented upon in the Illinois decision above referred to as follows:

> "It is apparent therefore that in demanding this tax of the shipper, *the Express Company has made no revision of its rates*, nor in fact fixed any increased rate, and that there is *simply an effort of the Express Company to make the shipper pay the tax.* * * *
>
> It is *not a revised increase* of rate because it adds to the former rate the same amount in each case or transaction. * * *
>
> The power to revise its rates and fix a reasonable charge or rate *does not authorize it to*

> *arbitrarily increase all its rates by a horizontal increase thereof* without regard to whether such increase leaves a rate as to any particular shipment a reasonable or unreasonable one. * * *
>
> It is an arbitrary attempt of the Company to make the shipper pay the tax which the law requires the Company to pay. The Court must regard the substance and not the pretence."

In the Michigan case above quoted, the language of the Court on this point is as follows:

> "It is contended, however, that the Company has the right to make new regulations and establish new rates to meet the burden. It is conceded that the effect of this is to throw the burden upon the shipper.
>
> It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax, and thus cast upon the shipper the burden which the Act of Congress puts upon the Company. *This is but an evasion and a subterfuge to avoid the terms of the Act.* The pretence that by raising the charges on each package just one cent without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously."
>
> *Atty.-Gen. ex rel. Moore* v. *Am. Ex. Co., supra.*

The facts of this case, therefore, do not bring up the question as to whether the Express Company has the right to make a *bona fide* revision of the rates in order to meet increased operating expenses.

They simply show a direct attempt on the part of the carrier, and even without disguise, to evade the burden of the tax by transferring it directly and by compulsion to the shoulders of the citizen.

And this attempt cannot succeed if our preceding arguments are well founded.

II.—*Even if the company be permitted to designate its increased charge as a raise of rate, it is nevertheless an unlawful act.*

The reasons for this are the following:

1. *If such an act were permitted, the company would be allowed to indirectly do a thing which it could not do directly.*

By whatever name such a transaction may be called, the results are the same.

The burden which was intended to be placed upon the carrier is thrown upon the shipper.

This is accomplished *without any contract* or agreement, direct or indirect, on the part of the shipper.

It is accomplished solely by the will of the *carrier, who relieves himself of this expense through compulsion and duress* exercised upon the shipper, and against his opposition.

And this purpose is permitted to be carried into effect by *allowing the carrier to refuse to do his common law duty, except upon the condition that the shipper shall permit him to violate the War Revenue Act.*

In any event, and by whatsoever means this is accomplished, *the carrier is exonerated at the expense of the citizen and the intent of the tax legislation is nullified.*

We have already endeavored to show that the construction of this statute, in the light of the carrier's, common law duty, imposes upon it a prohibition against such a compulsory shifting of the burden.

And if we have succeeded in demonstrating this contention, it follows that the result is precisely the same as though the War Revenue Act itself had contained an express provision that the burden of the tax should be borne by the carrier, and should not be shifted.

If such an express provision existed, it could

hardly be claimed that the carrier had a right to violate it directly or indirectly.

But there can, it seems to us, be no difference in the result whether such a prohibition arises from express language or from the necessary inferences to which we have alluded.

In either case, if it is a prohibition at all, *it must prohibit;* and to be effectual, it must prevent not only direct violations, but indirect ones as well. *And, therefore, it must be construed to prevent the carrier from accomplishing an evasion of the law by compulsion, whether exercised under the name of a raise of rates, or otherwise.*

2. *It is argued by the defendant as justification for such a raise of rates that the present tax is in the light of an additional operating expense,* and that it is always legitimate for a carrier to meet such an increase in cost of transportation by a corresponding increase in the shippers' rates, thus leaving the carrier exactly the same measure of profit as that which it derived before.

This claim we deny.

The tax in question is not one imposed merely upon property owned by the company.

It is a tax imposed *upon the business of transportation*—upon transactions which the carrier is not free to perform or not, as it sees fit, but which it is bound to undertake. It is a tax, which, as we have already shown, is intended by the Government *to be primarily and ultimately borne by the carrier.*

Such a tax should not, we submit, be construed in the same light as an ordinary expense, as bearing upon the question of the reasonableness of the rates charged the shipper by the carrier.

We think there is a clear line of distinction between the relationship of the carrier to the shipper on the one hand and the relationship of the carrier to the Government on the other.

We think it proper that all of the ordinary and necessary expenses of the carrying business resulting from its very nature should be considered in determining the question as to whether the charges imposed upon the shipper for these privileges are reasonable.

But we think that when this question has once been determined, and when a reasonable rate—as, for the sake of argument, we will assume it to be—has been established between the shipper and the carrier, based upon these ordinary and necessary expenses of the business, and when this rate has been seen to be productive of a certain profit to the company, which it has obtained by the exercise of *quasi* public franchises and privileges, *and when in view of these privileges and their consequent profits, the legislative powers have determined to impose upon the companies enjoying them a part of the burden of the national revenue*, instead of imposing a tax of an equivalent amount upon the citizen—that then, in view of these circumstances, it is not permissible for the company to treat this tax, imposed for these reasons, as being simply an additional expense of maintenance and operation in such manner that it may transfer the burden of it upon the citizen where it was not originally intended to be placed, *and thus continue to receive itself just the same profits as those upon which it was the intention of the Government to impose this liability.*

The test seems to us to be the result which follows from such action.

And there can be but one result which will follow if it is permitted to treat such a burden as an operating expense, and that is, *that the intent of the legislation, which was to impose the burden upon the business of transportation, and upon the profits which were derived from that business, will be entirely defeated; the profits will remain untouched; the carrier will successfully avoid any contributions*

to the National Treasury; and the burden will rest upon the citizen.

Such a result is not a reasonable one.

We have searched in vain for any authorities which will establish a right of this nature in a common carrier.

3. As a further justification for such a course, it has been urged by the appellee that a carrier always has the power to revise its rates as long as they are reasonable, that there is no proof offered by the appellant to show that the present increase of charges is unreasonable, and therefore that their action in this regard is not subject to attack in this proceeding.

The answers to this argument are the following:

(*a.*) *No act can be reasonable which is illegal.*

And if we have shown in the preceding discussion that the statute and the common law when taken together prohibit the shifting of this burden by compulsion either under the guise of raising the rates, or otherwise, it follows that any attempt to do so must necessarily be considered as unreasonable.

(*b.*) *No burden would in any event rest upon the appellant to show affirmatively that the increase in charges is unreasonable, but on the contrary, the burden will be upon the appellee to affirmatively show that it is reasonable.*

We certainly do not admit that even if such proof were presented it would be sufficient to defeat the operation of the law; for the act is a tax act, and the power of taxation is not trammelled save by constitutional prohibition.

Nor do we admit that such a point can be properly urged in a proceeding of this nature, or upon this appeal.

But, aside from such considerations, and even if

the question be material, *the carrier*, in order to avail himself of it, *must affirmatively show* that the burden of the tax reduces its rates to an unreasonable sum.

In other words, if the question of reasonableness or unreasonableness of rates under the operation of the law is open for discussion, *it must be governed by the same principles as those which apply in other cases where Legislatures have attempted to regulate the rates of carriage.* And the rule as to proof in such cases is that the statute is presumed to be a reasonable one, and the burden of proving the contrary is upon him who attacks it, and that unless such burden be sustained the act will remain in force.

> "Without undertaking to define the words reasonable and unreasonable, it is sufficient to say now that the *presumption is that a rate fixed by Congress is reasonable, and cannot be overcome except by some showing of figures and other facts as to the earnings of the road in question;* that is, expenses and receipts during an adequate period."
>
> *Atlantic & Pacific Railroad Co.* vs. *United States*, 76 Fed. Rep., 186.
>
> *Railroad Co.* vs. *Wellman*, 143 U S., 339.
>
> *Dow* vs. *Bedelman*, 125 U. S., 680.
>
> *Budd* vs. *New York*, 143 U. S., 117.
>
> *Reagan* vs. *The Trust Co.*, 154 U. S., 401.
>
> *Ruggles* vs. *Illinois*, 108 U. S., 541.
>
> *Missouri Pacific Railroad* vs. *Smith*, 29 S. W. Rep., 752.

As further bearing upon the question of the burden of proof, it must be kept in mind in the present instance that we find the *rates prior to July* 1, 1898, *had been long established by the defendant, and that since that date the rates have been increased.*

This fact alone, even in the absence of statutory restriction, has been held to be sufficient to throw the burden of the reasonableness of this change upon the carrier.

3 Interstate Commerce Commission Reports, 688.
5 Interstate Commerce Commission Reports, 13.
Wells vs. *Oregon Ry.*, 15 Fed. Rep., 561.

Hence, if any such question were investigated, unless the appellee can make some showing of expenses and income, *not in general language and estimates, but in the way of precise and specific facts* from which it will appear that the effect of this burden, if borne by it, will be to compel it to conduct its business upon an unreasonable basis, the appellant must prevail.

It would not be incumbent upon the appellant to enter, in the first instance, into any such computation.

(c.) *Since the record is silent upon this point, it follows that no presumptions can be indulged in to the effect that the tax would be an unreasonable burden upon the carrier.*

On the contrary, as shown by the foregoing discussion, it is to be assumed that, even if Congress intended the carrier to bear the tax, it will still earn a reasonable net return from its business.

Hence even if the increase in charge be considered as a true raise of rates, within the legal acceptation of the term, it stands upon the record as without sufficient reason, and therefore unjustifiable, if it be held that our view of the meaning of the statute is correct.

POINT III.

The first question certified should be answered to the effect that the war revenue law imposes the tax in question exclusively upon the carrier.

The second question certified should be answered in the affirmative.

Respectfully submitted,

FREDERIC R. KELLOGG and JAMES B. DILL,
ALLAN L. MCDERMOTT,
Of Counsel for Appellant.

No. 248.

Brief of A. McDermott, Esq.

Filed Oct 9 1899

Office Supreme Court U. S.
FILED
OCT 9 1899
JAMES H. McKENNEY,
Clerk.

MACRELLISH, DAY & MACRELLISH, Printers and Stationers, Trenton, N. J.

Supreme Court of the United States.

WILLIAM CRAWFORD,
Appellant,
against
WILLIAM L. HUBBELL, Treasurer of the Adams Express Company,
Appellee.

17,345.

October Term, 1899.

No. 248.

Brief of Allan L. McDermott, for Appellant.

NAAR, DAY & NAAR, Printers and Stationers, Trenton, N. J.

Supreme Court of the United States.

WILLIAM CRAWFORD, Appellant, against WILLIAM L. HUBBELL, Treasurer of the Adams Express Company, Appellee.	17,345. October Term, 1899. No. 248.

Brief of Allan L. McDermott, for Appellant.

Statement.

The questions certified to this court by the United States Circuit Court of Appeals in and for the Second Circuit, are:

(1). Does the War Revenue Act of June 13th, 1898, impose upon the carrier exclusively the tax represented by the stamp to be affixed to each bill of lading, manifest or other evidence of receipt required to be issued to each shipper of

goods accepted by the carrier for transportation, or does it impose the tax merely upon the transaction of the shipment, leaving it to be paid indefinitely by either party thereto?

(2). If the War Revenue Act of June 13th, 1898, does impose such tax exclusively upon the carrier, does it preclude the carrier, who is by such act required to issue to each shipper a bill of lading, manifest or other evidence of receipt, from relieving itself of the expense of offering and cancelling the stamp required to be attached to such bill of lading, manifest or other evidence of receipt?

Argument.

I.

It is against public policy to leave the question of payment of this tax to individual adjustment.

Common carriers must have uniform rates, but if it is held that the payment of this tax is to be agreed about between shipper and carrier, and that no duty is upon the carrier while this agreement is reached, it necessarily follows that parties are unrestricted in reaching their agreements. The defendant can refuse to carry the packages offered by the plaintiff unless the tax is paid, but

will be at liberty to pay the tax upon the consignments of a competing merchant. If the law has not placed the burden—if it is a shiftable tax, with the carrier in charge of the shifting machinery—a new door has been opened for unjust discrimination in the cost of transportation. If the payment of this tax is to be according to agreement between shipper and carrier, each transaction may be the subject of a separate agreement, and the carrier may yield to one shipper and refuse another. If the attitude of the government is impersonal as to one transaction, it must remain so as to subsequent shipments. If it is true, as contended by the appellee, that the "transaction of shipment cannot occur," unless shipper and carrier agree, each transaction will afford basis for a new agreement, and the carrier may discriminate. If it was not the intention of Congress to tax the carrier, it would be manifestly unfair to say that his agreement to pay the tax in one instance would establish a rule to be followed in all subsequent cases.

II.

The appellant demands that the company shall discharge its common law duty. It is bound to ac-

cept the goods for transportation, and this duty is in nowise affected by the War Revenue Act.

It is the duty of the express company to issue "a bill of lading, manifest or other evidence of receipt and forwarding." A failure to issue this evidence subjects the express company to a penalty. To each bill of lading, or duplicate thereof, there must be "duly attached and cancelled, as in this act provided," a one cent stamp.

The stamp must be affixed and cancelled by the express company. Section 6 of the War Revenue Act provides that the person using or affixing the stamp shall cancel it, and as the express company is penalized for failure to issue a receipt bearing a cancelled stamp, it follows that the stamp is to be cancelled by the express company.

So far as any given case is concerned, it may be a matter of indifference to the consignor whether a receipt is issued. The law does not visit him with any penalty for failure to receive a bill of lading. He can maintain an action if the express company fails to perform its duty as a common carrier, the law providing, as against the consignor, only that an unstamped receipt shall not be used in evidence, a provision effectual in State courts only through comity.

The common law imposes a duty on the common carrier. It must, being tendered its carrying charges, carry the goods. As to its relations with the government, the matter is, to the appellant, an impersonal one. The receipt is to be given after goods are "accepted for transportation," and the validity or extent of the contract for carriage is not affected by observance of the War Revenue Act. The carrier cannot say: "The government has made it my duty to give you a stamped paper evidencing what I am to do with these goods. I will not perform my duty as common carrier unless you pay for the stamp imposed on that paper."

In the case of a contract between persons upon neither of whom a duty is cast, the government may well maintain an impersonal attitude; but where the law imposes a duty to perform service, it is against public policy to put it in the power of him upon whom the duty is devolved to say that he will not perform it unless the applicant for performance will make two payments—one for the service requested and the other of a tax imposed upon the person who is bound to render that service.

The act is entitled "An act to provide ways and means to meet war expenditures and for other

purposes." It is presumable that Congress, in fixing the taxes therein found, calculated the revenue obtainable from the probable business of common carriers, and it would be impossible to make such a calculation if the business of these carriers was divorced from their duty to the public. The object of the act negatives the idea that common carriers can refuse to perform their public or *quasi* public functions unless consignors pay the tax imposed upon those carriers. It does not subtract from the duty owing from the carrier to the public. It does not weave into the law governing those duties the right to demand return of a tax imposed upon the carrier. No duty being imposed upon the consignor, the common carrier cannot say that he will not discharge his duties, as such, unless the tax imposed upon him is paid by the consignor.

When a package is presented to a common carrier, for transportation, he may not receive it or reject it, as he wills. He is bound to receive it and carry it. That is the duty he owes as a common carrier. He is bound to pay, on each package received, revenue to the government. The duties are separate and distinct. One he owes to the consignor the other to the nation. He cannot avoid the latter by refusing to perform the former,

nor can he make relief from the duty to the government a condition precedent to his performance of duty to the would-be consignor. The act does not add to or subtract from the duty to accept for transportation, and it is only after he has accepted the goods "for transportation" that a tax is imposed.

To say that the law authorizes a common carrier to refuse to receive goods unless he is secured against a tax to fall due after he has received the goods is to hold that the probable revenue from common carriers is to be calculated in the light of their right to refuse to perform their common law duties unless they are relieved from the impending tax. If this is true, the taxing power may be truly said to have viewed the relations of the parties as impersonal to the government, and left the consignor and common carrier to adjust the payment of the tax between themselves. But that it is not the true construction of the act seems clear from the fact that the tax is to be paid by the common carrier when he undertakes a duty of which he cannot legally refuse performance.

III.

The receipt is not made, signed or issued for the use or benefit of the consignor, but for the benefit of the government.

The "*Express and Freight*" clause in Schedule "A" provides that there shall, to each bill of lading therein commanded to be issued, be "duly attached and cancelled, as in this act provided," a stamp. If the carrier fails to issue any paper, the penalties provided by section 13 cannot be inflicted. This clause puts upon the carrier the duty of issuing a paper that can be stamped. The duty to create this paper arises when goods are accepted for transportation. There is not any penalty pronounced in this clause, against the carrier, for issuing an unstamped receipt or bill of lading. If this clause was alone in regulating penalties for omission, it would be clear that it was the duty of the carrier to issue the receipt, and the stamp could and would be affixed or rejected, in accord with the desire of the consignor to use it as evidence of his rights.

But this clause provides that there shall be, to each bill of lading, a stamp "duly attached and cancelled, as in this act provided," while section 7

provides a penalty for *making* a receipt without affixing a stamp. The intent of the maker is irrelevant under this section. Section 13 provides severer penalties for failure to stamp, with intent to avoid the provisions of the act. It is apparent, from these sections, that the "*Express and freight*" clause, when it provides for the issuance of a receipt, with a stamp "duly attached and cancelled," creates the "duty" of issuing a properly stamped receipt. The rules of construction leading to this conclusion are elementary.

It being found,

(a). That the act imposes upon the carrier the duty of issuing a paper to which a stamp can be affixed.

(b). That the stamp must be affixed before the paper is made, signed or issued.

(c). That the common law duty of the carrier is not affected by the act.

It follows that the attitude of the government is not impersonal between the would be consignor and the common carrier, for section 6 provides that the tax in respect of the receipt, or for and in respect of the paper upon which it shall be written or printed shall be paid "*by any person or persons, or party who shall make, sign or issue the same, or for whose use or benefit the same shall be*

made, signed or issued." The paper described in the clause of "Schedule A" is not issued for the "use or benefit" of the consignor. It is, so far as this act is concerned, an instrument created for the benefit of the government, to ensure the collection of a tax imposed upon the maker of the receipt. Its forms are described to include "a bill of lading, manifest, or other evidence of receipt and forwarding." Its creation is made a "duty," not to the shipper, but to the government. The carrier is bound to issue the bill of lading; the shipper is not bound to receive it. It need not contain the contract between shipper and carrier.

So far as this act is concerned, I respectfully insist that the government having, to obtain revenue, provided that common carriers shall issue stamped receipts, those receipts cannot be said to be made, signed or issued for the benefit of the consignor. So far as this act is concerned, the shipper is in the position of a passenger who knows that, having tendered his fare, he is entitled to ride without regarding the fare indicator at the end of the car. The act having provided, for the benefit of the *government*, a method of taxing common carriers, the shipper cannot be compelled to pay that tax merely because the law has put him on guard over its revenue.

In the arguments for the carriers, section 28 has been often referred to as illustrating what Congress "would have said" if it had been intended to tax the express companies. That section provides a penny tax on each seat or berth sold in a parlor or sleeping car, "the stamp to be affixed to the ticket and paid by the company issuing the same." The circumstances inviting the act to the statute book also beckoned celerity, and the taxation of seats and berths is found between sections taxing, respectively, sugar and legacies. Like all hurried legislation, the act bears the marks of many pens, but the phraseology of section 28 does not make for the argument of the express companies. Rather will it be reasoned "why should the carriers of wealthy travelers be directed to pay the tax while the carriers of goods escape?" Very dim light can, at the best, be obtained by comparing burdens imposed by a War Revenue Act, and I respectfully submit that the pertinent sections provide that common carriers shall pay the tax and that the receipts are the only means insisted upon to insure that payment.

IV.

Whether an express company may, because its taxes are increased, advance its rates, is not involved in the question *sub judice*, for the defendant does not pretend to have revised its rates. It does not demand anything additional to the old rates for the transportation of goods, nor pretend that the cost of carriage has been increased. It does not include the penny tax in its rate for carriage, but says that it will not perform its duty as a common carrier unless it is reimbursed for a tax imposed upon each shipment received. A common carrier cannot demand anything except payment for carriage. An express company cannot demand, for the performance of its duty to a shipper, its rate for carriage, *plus something*. A prudent carrier will undoubtedly include, in its rates for transportation, items to meet its fixed charges, but it would be an amazing doctrine that would establish the right of a common carrier to charge, on each package, large or small, without respect to distance of carriage, a penny contribution to a sinking fund for the payment of its debts. Yet the rates fixed by a common carrier may, and probably should, be fixed with a reasonable reference to the liquidation of its debts. The

duty of an express company to receive, carry and deliver, when there is nothing objectionable in the consignment, is absolute, and it is bound to perform this duty when it is offered the reasonable compensation for *receiving, carrying and delivering*. To this time honored and protected common law proposition, it was surely not the intention of Congress to make the addenda insisted upon by the defendant, that if the shipper will not pay a tax imposed upon the carrier, "the only result which must follow is that the transaction of shipment cannot occur."

V.

As the express company cannot make the payment of the tax by the shipper a condition precedent to the receipt of goods for transportation, it follows that the tax is imposed exclusively upon the carrier. It must receive the goods; it must issue the receipt, and it must provide, affix and cancel the stamp.

As the duty of providing, affixing and cancelling the stamp is imposed upon the carrier, it cannot relieve itself by reimposing the tax, specifically, upon the shipper. If any reimposition is allowable its terms must be found in a redistribution

of all the expenses of the carrier upon all its business. It must collect this tax if at all, in the same way that it collects the taxes imposed by States and municipalities. The shipper cannot, in order to have that carried which the law says shall be carried, be compelled to pay for carriage *and something else*. Whether, in the cost of carriage, the war tax may be included by any scheme of indirect reimposition of the tax upon all the business of the carrier, is not within the mooted points, involving, as it does, the question of whether this tax upon the carriers would justify a readjustment of their rates.

ALLAN L. McDERMOTT,
Counsel for Appellant.